(20075).

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 195.

FREDERICK LOWREY, GEORGE P. CASTLE and W. O. SMITH, TRUSTEES,
Appellants,

vs.

THE TERRITORY OF HAWAII,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR RESPONDENT.

E. C. PETERS,
Attorney General, Territory of Hawaii;

M. F. PROSSER,
First Deputy Attorney-General, Territory of Hawaii,
For Respondent.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
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RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

This matter comes before this Court on appeal from the final judgment of the Supreme Court of the Territory of Hawaii, dated the 3rd day of January, A. D. 1906, sustaining the demurrer of respondent to petitioner's petition and dismissing said petition.

The facts as appear by the record are, briefly, as follows:

The American Board of Commissioners of Foreign Missions,

in the year 1835 made an application to have the land upon which Lahainaluna Seminary was established awarded to it by the Board of Commissioners to Quiet Land Titles; such application was thereafter withdrawn for reasons which appear on page 2 of the record, as follows: "Lahainaluna, Part 2, Sec-"tion V. *Claim relinquished before the land commission in "consequence of and after arrangement having been entered into "by the Hawaiian government with the Mission," and upon the* final confirmation of the title of the American Board of Commissioners of Foreign Missions to property located on the Island of Maui, that portion claimed as part 5, Section 2, being the premises upon which the Lahainaluna Seminary stood, was expressly excepted from the award.

On the 25th day of April, 1849, the American Board of Commissioners of Foreign Missions, through its representatives in Hawaii, offered to transfer said seminary to the Hawaiian government (it having prior to that date been supported by said American Board as a mission school) upon the following conditions:

First: "That the said Hawaiian Government agrees that the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and"

Second: "That it shall not teach or allow to be taught any religious tenet or doctrine contrary to that heretofore inculcated by the mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed. And that in case of the non-fulfillment or violation of the conditions upon which this transfer is made by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises and all the rights and privileges hereby conveyed or transferred to the Hawaiian Government, by the said Island Mission, shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." (Trans. p. 10.)

This offer as made was not accepted by the Government, but it instead submitted a counter offer to the Mission by which it offered to take over the school on the conditions made in the Mission's original offer, but "provided that in case of the non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the Island, or pay the sum of $15,000 to said Mission, in behalf of the Mission Board in Boston." Which counter offer was accepted by the prudential committee of the American Board of Commissioners for Foreign Missions in the month of March, 1850. (Trans. p. 16.)

This offer to transfer the Lahainaluna Seminary or school to the Hawaiian Government amended as hereinbefore set forth was duly accepted by the Privy Council of the Kingdom of Hawaii subject to the ratification of the Legislature on the 26th day of April, 1849. (Trans. p. 12.) The Confession of Faith hereinbefore referred to is set forth at length on page 15 of the Transcript. The Legislature of Hawaii ratified the action of the Privy Council of April 26th, 1849, (Trans. p. 3), in the following manner:

Civil Code 1859, Sections 738, 739: "Whereas, an arrangement has been made between the Hawaiian government and the American Board of Commissioners of Foreign Missions whereby the seminary of Lahainaluna has been ceded to the King's government *on condition that the government undertake its support, and whereas it is desirable to have some institution where Hawaiian youth can be properly educated for various*

occupations, therefor the instrument whereby the seminary of Lahainaluna has been surrendered to the King's government is hereby ratified and confirmed and a reasonable sum shall be appropriated annually out of the public funds for the support of said seminary in pursuance of said arrangement.

"Section 739. Said Seminary shall be under the care and direction of the Board of Education, who shall appoint its teachers and make rules and regulations from time to time for its government and course of instruction, *provided that such rules and regulations do not conflict with the conditions on which that institution was ceded to the government, nor with any law of this kingdom.* Said Board shall have the care and management of the buildings, premises, apparatus and all property belonging to said institution."

No deed of conveyance was ever executed and such agreements as exist between the parties are represented by the offer and qualified acceptance hereinabove referred to and the act of the Legislature of the Kingdom of Hawaii above quoted. It is contended by the appellants herein that both of the conditions upon which the transfer was made by the American Board to the Kingdom of Hawaii have been broken and that the American Board, by reason of such breach, is entitled at this time to recover the premises conveyed, or to receive from the Territory of Hawaii the sum of $15,000.00, pursuant to the terms of the contract between the parties. (Trans. p. 3.) The only question before this court is whether or not the pleadings filed herein show any breach of a condition which would entitle the appellants to the relief prayed for in the complaint.

BRIEF OF THE ARGUMENT.

I.

SUCH CONDITIONS AS WERE ATTACHED TO THE TRANSFER OF LAHAINALUNA SEMINARY WERE CONDITIONS SUBSEQUENT.

CONDITIONS SUBSEQUENT ARE STRICTLY CONSTRUED AS AGAINST THE GRANTOR AND NOTHING WILL BE TAKEN BY WAY OF INTENDMENT IN FAVOR OF THE GRANTOR.

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species *summum jus,* and in many cases hardly reconcilable with conscience. If the condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor; or if it be impossible at the time of making it, or against law, the estate of the grantee, being once vested, is not thereby devested, but becomes absolute."

4 Kent's Comp. p. 138.

Woodworth v. Payne, 74 N. Y. Rep. 196-199.

This was a case of a grant of certain property for church purposes upon the condition that the seats therein should be forever free for the use of any and all persons and if the seats in said church should be rented or sold, then the premises should revert to the grantor. The church in question, together with the seats therein contained, was sold, the conveyance containing the same restrictions relative to the use of the premises and the seats in the church, as was contained in the original grant. A forfeiture was claimed for the reason that the sale of the church property carried with it the sale of the seats therein, and therefore the condition of the grant was broken.

"Miller, J. Conditions in grants are not favored in law, and hence they must be clearly expressed. *(Craig v. Wells,* 11 N. Y. 315.) They are also to be construed with great strictness,

because they tend to destroy estates; and the rigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience. (4 Kent's Com. 130.) Nor are they to be sustained by inference or recital."

Mills v. Evansville Seminary, 58 Wis. 136-139.

In the case above quoted, a forfeiture was claimed for breach of condition, the property in question having been conveyed upon the express condition "that the premises thereby agreed to be conveyed to the defendant corporation were to be used for a site for seminary grounds and buildings only, and that the title should revert to the plaintiff when they ceased to be used for such purposes." The evidence in the case showed that the grounds and buildings had been in fact abandoned by the defendant for seminary purposes for a considerable period of time, but that shortly prior to the commencement of the action, such use had been recommenced.

"It appears that in December, 1875, the trustees of the seminary called a meeting of the legal voters of the corporation, to be held on the 6th of January, 1876, to take into consideration what should be done with the seminary property. At this meeting in January, which was attended by only a minority of the voters, a resolution was adopted which stated in substance that the seminary had been abandoned as an institution of learning, and all efforts to induce any other denomination to accept the property and endow and maintain a school there had failed; that as the property in its unprotected condition would soon run down and become worthless, the board of trustees was empowered and directed to deed the seminary property to a corporation recently organized in the village, known as the Evansville Boot & Shoe Company. Mr. Mills was present at this meeting and voted against the resolution, and we think, it appears that he always resisted that disposition of the property. Still, the Evansville Seminary, by its officers, deeded the property January 19, 1876, to the Evansville Boot & Shoe Company. Before this deed was executed the plaintiffs made a written demand for the Evansville Seminary to surrender to them the 'Seminary Park' as reversionary owners.

But though the property was conveyed to the Boot and Shoe Company, the corporation never took possession of it or assumed to control it, the possession practically remaining all the while in the seminary corporation. On the 22d of December, 1879, the Boot and Shoe Company reconveyed the property to the defendant corporation.

"It is elementary law that such conditions are most strongly construed against the grantor, and that a forfeiture will not be enforced unless clearly established. It is doubtless true, as claimed by defendants' counsel, that courts do not hasten to seize upon mistake or neglect, or even misuser of property, to adjudge a forfeiture in cases of this nature.

"The failure to maintain a school in the building for a considerable period, it appears, resulted from causes which the trustees could not well overcome or control, and ought not to work a forfeiture."

"It is a general rule, that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases."

Voris v. Renshaw, 49 Ill. 431.

"Clear Proof of Forfeiture.—A condition cannot be extended beyond its terms, and a party who insists upon a forfeiture of an estate for a breach of a condition must bring himself clearly within the terms of the condition."

2 Devlin on Deeds, Sec. 973.

"When a grantor of land seeks to re-enter for breach of a condition subsequent he should be required to establish something more than a technical encroachment through the action of strangers without the grantee's permission. It is not enough to show in this way that the letter of the condition is violated, *but it must appear that its true spirit and purpose have been wilfully disregarded by the grantee.*"

Rose v. Hawley, 141 N. Y. 378.

II.

IT DOES NOT APPEAR BY THE RECORD THAT ANY OF THE CONDITIONS OF THE TRANSFER HAVE BEEN BROKEN.

The condition that "it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed" certainly is not shown to be broken by the pleadings; it would require an allegation that religious doctrines *contrary* to the adopted creed were taught. In no other way could a breach of the foregoing condition be shown.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture. The averment in the petition of the fact that the "cultivation of sound literature and solid science has also ceased" would raise an issue of fact to be tried on evidence were it not modified, and necessarily controlled, by the additional averment that "the institution has become a technical school under the name of the Lahainaluna Agricultural School." By the rule that at common law pleadings are construed, as far as they reasonably may be, against the pleader, the additional averment must be taken to be an admission that the usual technical training is now given at the school in the science of agriculture, so that it becomes a question of law whether such training eliminates, as contended by the plaintiffs, or, on the other hand, includes instruction in sound literature and solid science. An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. It is not apparent why such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

III.

THE TRANSFER AS RATIFIED BY THE LEGISLATURE WAS UPON THE CONDITIONS SET FORTH IN SECTIONS 738-739 OF THE CIVIL CODE OF 1859 HEREINBEFORE SET FORTH IN FULL.

The wording of the statute above referred to, "Whereas, it is desirable to have some institution where Hawaiian youth can be properly educated *for various occupations, therefore* the arrangement * * * is hereby ratified and confirmed," shows clearly that in the mind of the Legislature the school was to be used for the purpose of educating Hawaiian youths *in various occupations* and was not to be confined to the instruction then given.

By Section 739 the care and control of the institution is placed in the Board of Education which is given power to make rules and regulations which *"do not conflict with the conditions upon which the institution was ceded to the government nor with any law of this Kingdom."*

IV.

Upon the overthrow of the Monarchy in the year 1894, the property in question together with other public property was taken over by the Provisional Government of Hawaii and thereafter upon the establishment of the Republic became a part of the public domain subject to such conditions and restrictions as were imposed by law, not contrary to the provisions of the Constitution of the Republic.

Article 92 of the Constitution provides as follows:

Section 1. "All Statutes and enactments in force in the "Hawaiian Islands at the time this Constitution takes effect "not inconsistent therewith, and all rights, actions, prosecutions, "judgments and contracts then existing and valid, shall continue "as if this Constitution had not been adopted unless the same "are inconsistent with this Constitution, or are herein specifically abrogated, or are otherwise herein provided for."

By Article 97 of the same constitution it is provided that "From and after December 31st, 1895, no public money shall "be appropriated * * * for the support or benefit of any "sectarian denominational or private school or any school not "under the exclusive control of the Government," which provision was re-enacted as a part of the Organic Act of the Territory of Hawaii in Sec. 55 thereof.

Under the foregoing provisions of the constitution, Lahainaluna Seminary could no longer exist as a sectarian or denominational school and if any breach of the original conditions of the transfer has been made, such breach is the result of the laws enacted by the Republic of Hawaii and the Congress of the United States which made compliance with such conditions impossible.

Constitution of the Republic, Sec. 97 *supra.*

Organic Act, Sec. 55.

WHEN THE PERFORMANCE OF CONDITIONS SUBSEQUENT IS PREVENTED BY THE ACT OF GOD OR BECOMES CONTRARY TO LAW BY REASON OF THE TRANSFER OF THE TERRITORY OR CHANGE OF GOVERNMENT FAILURE TO FULFIL SUCH CONDITIONS WILL NOT WORK A FORFEITURE OF THE ESTATE.

The force of conditions subsequent as applied to public grants, was discussed by the United States Supreme Court in the case of the *United States v. Arredondo et al.*, reported in 6 Peters, at page 745. The question there before the court was as to a condition subsequent which required that 200 Spanish families should be placed upon certain property granted by the Kingdom of Spain to Spanish settlers shortly prior to the annexation of Florida to the United States of America. The condition subsequent, to-wit, that 200 Spanish families should be placed on the lands granted became impossible of performance by reason of the annexation of Florida to the United States of America,

the territory granted becoming subject to laws and conditions not existing at the time of the original grant.

Baldwin, J., delivered the opinion of the Court.

"We are not prepared to say that the condition of settling two hundred Spanish families on an American Territory has been, or is possible; the condition was not unreasonable or unjust at the time it was imposed, its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States would be demanding the *summum jus* indeed, and enforcing a forfeiture on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves at all events justified, if not compelled, to declare that the performance of this condition had become impossible by the act of the grantors; the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity on such grounds as these; we are not either authorized or required by the law which has devolved upon us the final consideration of this case to be guided by such rules or governed by such principles in deciding on the validity of the claimant's title. Though we should even doubt, if sitting as a court of common law and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity; according to its established rules our decree must be in conformity with the principles of justice, which would in such a case as this not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

Scoville v. McMahon, 62 Conn. 378;

Wheeler v. Moody, 9 Tex. 371-376.

It is respectfully submitted in conclusion that the appellants are attempting to enforce a forfeiture herein on grounds which

are clearly inequitable and cannot appeal to the conscience of the court.

The creed, for failure to teach which a forfeiture is claimed, is no longer taught or permitted to be taught by the denomination prescribing it, and the school established by the American Board as Lahainaluna Seminary is continued today along the same lines as originally established, with such improvements and changes as experience, time and changed conditions have required, and made necessary and desirable.

It is respectfully submitted that the appeal of Appellants should be dismissed and that the judgment of the Supreme Court of Hawaii should be affirmed.

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